

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 01 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT R. DEARINGER,

Defendant - Appellant.

No. 04-30530

D.C. No. CR-04-00361-MJP

AMENDED MEMORANDUM^{*}

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Submitted October 17, 2005^{**}
Seattle, Washington

Before: CUDAHY^{***}, T.G. NELSON, and McKEOWN, Circuit Judges.

Robert R. Dearinger appeals his sentence of 100 months in prison following a plea of guilty to bank robbery in violation of 18 U.S.C. § 2113(a).

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

^{***} The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Dearinger argues that the district court committed nonconstitutional error by sentencing him under the mandatory United States Sentencing Guidelines (“U.S.S.G.”) in violation of United States v. Booker, 543 U.S. 220, 245-46, 268 (2005). Because Dearinger preserved his Booker claim, we review for harmless error, see United States v. Seschillie, 310 F.3d 1208, 1214 (9th Cir. 2002), and we conclude that the government failed to meet its burden to establish that “it is more probable than not that the error did not materially affect the verdict.” See id. at 1215. Accordingly, we reverse the district court’s sentence and remand for resentencing. Id. (under harmless error review, “‘we must reverse . . . unless it is more probable than not’ that the error was harmless.”) (citations omitted).

Dearinger also appeals the district court’s finding that his prior convictions are predicate offenses under the career offender provisions of U.S.S.G. § 4B1.1. The status of a prior conviction as a predicate felony for purposes of federal sentencing is determined by reference to the statutory maximum sentence. United States v. Murillo, 422 F.3d 1152 (9th Cir. 2005). In Murillo, we held that “the maximum sentence that makes a prior conviction under state law a predicate offense under 18 U.S.C. § 922(g)(1) remains, after Blakely, the potential maximum sentence defined by the applicable state criminal statute, not the maximum sentence which could have been imposed against the particular defendant for his

commission of that crime according to the state's sentencing guidelines." Id. at 1154. The Murillo analysis applies to the interpretation of predicate offenses under U.S.S.G. § 4B1.1 as well. The statutory maximum sentences for Dearing's prior convictions well exceeded one year. Accordingly, the district court did not err in finding that Dearing's prior convictions are predicate offenses under U.S.S.G. § 4B1.1.

The career offender finding is **AFFIRMED**, and the sentencing decision is **REVERSED** and the case is **REMANDED** for resentencing. In fulfilling this mandate, the district court may hold such hearings and enter such orders as it determines to be necessary.